

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.**

In the Matter of	)	
	)	
Section 68.4(a) of the Commission’s Rules	)	WT Docket No. 01-309
Governing Hearing Aid-Compatible	)	RM-8658
Telephones	)	

**VERIZON WIRELESS  
PETITION FOR RECONSIDERATION**

Verizon Wireless hereby petitions the Commission, pursuant to Section 1.429 of the Rules, to reconsider and modify two aspects of its August 14, 2003, *Report and Order* in the above-captioned proceeding.<sup>1</sup>

First, new Section 20.19(c), which imposes different implementation requirements for offering digital HAC handsets based only on a wireless carrier’s size, is unsupported by the record and contrary to law. These different requirements on different carriers create an unexplained, unjustified regulatory disparity that may skew the competitive marketplace. They may also deprive some hearing-impaired consumers of the options that are available to other consumers – merely because of the particular carriers hearing-impaired consumers may choose. The Commission should modify Section 20.19(c) by deleting subsection (3), which imposes additional requirements on six “national” wireless carriers but no others. The HAC rules should be fully consistent for *all* covered wireless carriers.

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<sup>1</sup> *In the Matter of Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, Report and Order*, WT Docket No. 01-309, RM-8658, FCC 03-168 (rel. Aug. 14, 2003) 68 Fed. Reg. 54173 (Sept. 16, 2003) (“*Report and Order*”).

Second, Section 20.19(j), which authorizes state commissions to adopt the rules and create their own separate enforcement procedures and remedies, is also unsupported by the record and thus unlawful. This rule is also directly contrary to both the Communications Act and the Commission's often-stated policy as to the importance of uniform national regulation of the wireless industry. Exclusive federal oversight and enforcement of wireless technical standards, particularly in the area of radio equipment RF standards, is sound and settled Commission policy. Again, the Commission offered no rationale for such a radical departure from that policy. This rule should also be removed.

**I. THE RULES SHOULD BE CONSISTENT FOR ALL WIRELESS CARRIERS.**

New Section 20.19(c) imposes a series of implementation deadlines for covered wireless carriers to meet performance standards for their digital wireless handsets. Within two years each carrier providing digital wireless services must make commercially available at least two handsets for each air interface in its product line (i.e. CDMA, TDMA, GSM, and iDEN) which meet the U3 performance level (acoustic coupling) under ANSI C63.19. However, within two years, a special rule, Section 20.19(c)(3), requires each Tier I wireless carrier to make available to consumers at least two phone models that meet the U3 requirements, or 25 percent of the total number of wireless phone models it offers, *whichever is greater*. This provision imposes a stricter requirement on Tier I carriers than on all other wireless carriers. Carriers today offer a frequently-changing mix of as many as 20 or more models. Tier I carriers must, under the new rules, offer more models to consumers solely because they have been included in that tier.<sup>2</sup>

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<sup>2</sup> The Commission defined Tier I wireless carriers in the Enhanced 911 proceeding as the six CMRS carriers with national footprints. *See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 17 FCC Rcd 14841, 14843 (2002). But it made no determination there that the tiered approach used for E911 would later be transported into other proceedings having nothing to do with E911.

On reconsideration, the Commission should delete this special rule so that the implementation obligations are consistent for all wireless carriers. The Commission's individualized waiver process under Sections 1.2 and 1.925 of the Rules is available for a wireless carrier that can demonstrate that the public interest would be served and that the other standards for waiver of the HAC rules are met. But there is no legal or policy justification for the Commission to have incorporated into the HAC rules a different requirement based solely on carrier size that divides a competitive industry into two camps with disparate obligations.

First, the Commission does not square its disparate treatment of Tier I carriers with the express terms of the HAC Act. The HAC Act requires the Commission to “revoke *or otherwise limit* [the public mobile services] exemption if [it] determines that -- (i) such revocation or limitation is in the public interest; (ii) continuation of the exemption without such revocation or limitation would have an adverse effect on hearing-impaired individuals; (iii) compliance with the requirements of paragraph (1)(B) is technologically feasible for the telephones to which the exemption applies; and (iv) compliance with the requirements of paragraph (1)(B) would not increase costs to such an extent that the telephones to which the exemption applies could not be successfully marketed.”<sup>3</sup> Whatever the merits of the Commission's overall decision to lift the public mobile services exemption, the Commission made no effort in the *Report and Order* to justify the “limitation” of the exemption for non-Tier I carriers in accordance with the terms of the HAC Act.

Second, the *Notice of Proposed Rulemaking* in this proceeding did not propose any such tiering of requirements so that different carriers would face different obligations. Nor to Verizon Wireless's knowledge did any commenting party make such a proposal – a further, significant

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<sup>3</sup> See 47 U.S.C. § 610(b)(2)(C).

indication that the Commission afforded no notice that it was considering imposing disparate regulatory treatment on Tier I carriers. The Commission's decision to adopt a different two-year compliance rule for Tier I carriers than for other carriers cannot be squared with its obligation under the Administrative Procedure Act to afford interested parties adequate notice and an opportunity to respond to proposals.

Third, the *Report and Order* provides no explanation for treating customers of different carriers differently. Under the rules as adopted, hearing-impaired customers of a Tier II or Tier III carrier may well have fewer choices of HAC-compatible handsets. No explanation is provided for why such a line should be drawn, let alone why it was drawn where it was. The Commission is required to explain the choices it makes in imposing rules by direct reference to the factual record. It did not do so here. In the *Enhanced 911 Phase II, Small Carrier Stay Order*, from which the Commission derived its Tier I definition, it created separate implementation deadlines for different carriers based on the specific facts in that proceeding.<sup>4</sup> Here, in contrast, the Commission failed to provide any data or analysis demonstrating a rational basis for imposing a stricter HAC two-year requirement depending on the carrier's Tier I classification. It did not rely on any evidence as to why being a Tier I carrier is relevant to offering new equipment and capabilities to the hearing-impaired.

The Commission's Regulatory Flexibility Analysis, finding that "[t]he critical nature of hearing aid compatibility with wireless phones limits the Commission's ability to provide small ... wireless service providers with a substantially less burdensome set of regulations than that placed on large entities," militates *against* imposing a disparate requirement on Tier I carriers.<sup>5</sup>

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<sup>4</sup> See *Revision of Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Order to Stay, 17 FCC Rcd. 14841 (2002) ("Small Carrier Stay Order").

<sup>5</sup> See *Report and Order*, App. B. ¶ 11.

With no explanation, however, and in derogation of its own Regulatory Flexibility Analysis, the Commission made carrier size (and nothing else) the determinative factor in imposing the disparate requirement for handset availability at the two-year point.<sup>6</sup> Because the Commission failed to “articulate a satisfactory explanation” when imposing disparate obligations on the entities it regulates,<sup>7</sup> its action was unlawful.

Fourth, the *Report and Order* departs without explanation from the landmark Commission decisions to implement the 1993 amendments to Section 332 of the Communications Act. One of Congress’s key goals in amending Section 332 was, as the legislative history declared, to ensure that, “consistent with the public interest, similar services are accorded similar regulatory treatment.”<sup>8</sup> In giving force to that goal in a series of 1994 decisions, the Commission found that consistent rules for competing CMRS providers “will minimize the potentially distorting effects on the market of asymmetrical regulation.”<sup>9</sup> It continued:

Last year, in the Budget Act, Congress created the CMRS regulatory classification and mandated that similar mobile radio services be accorded similar regulatory treatment under the Commission’s Rules. The broad goal of this action is to ensure that economic forces – not disparate regulatory burdens – shape the development of the CMRS marketplace.<sup>10</sup>

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<sup>6</sup> The disparity in the two-year rule stands in contrast to other rules adopted in the *Report and Order*. The three-year deadline for making available telecoil coupling capable handsets and the February 18, 2008, deadline for ensuring that 50 percent of handsets comply with the U3 requirement do not specify a different requirement for different sizes of carriers. No explanation is offered for this discrepancy.

<sup>7</sup> See *Fresno Mobile Radio, Inc. v. FCC*, 165 F3d 965 (D.C. Cir. 1999); *McElroy Elec. Corp. v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993) (reminding FCC “of the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment”); see also *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency must “articulate a satisfactory explanation for its action”).

<sup>8</sup> H. Conf. Rep. 103-213, 103d Cong., 1<sup>st</sup> Sess. 493 (1993).

<sup>9</sup> *Implementation of Sections 3(n) and 332 of the Communications Act, Third Report and Order*, 9 FCC Rcd 7988, 8003 (1994).

<sup>10</sup> *Id.*, at 7994, 8024.

Action was needed to ensure “regulatory symmetry” among CMRS providers because, otherwise, “disparate technical and operational rules might remain in effect, to the detriment of competition and thus to consumers, because differences in these rules could distort competition by providing advantages to some carrier and imposing handicaps on others.”<sup>11</sup>

While there may conceivably be situations where disparate treatment may be warranted in spite of the statutory goal (and clear competitive benefits) of regulatory symmetry among competing CMRS providers, the Commission must at a minimum marshal specific facts to depart from Section 332’s mandate. No such facts are offered here, however. For this reason as well, the asymmetry created by a different mandate on Tier I carriers versus other carriers should be removed. The Commission should reconsider its decision to impose a different two-year implementation requirement based on a carrier’s size, and instead mandate a consistent requirement on all wireless carriers, by removing new Section 20.19(c)(3).

## **II. THE COMMISSION, NOT STATES, SHOULD ENFORCE THE HAC RULES.**

The *Report and Order*, in a single paragraph, authorizes the individual states to adopt the HAC rules as well as procedures to “enforce” these rules. While the brief discussion in paragraph 95 contains a passing reference to the Commission’s enforcement rules for hearing aid compatibility between *landline* network equipment and hearing aids, there is no acknowledgment of the very different regulatory regime that governs the provision of CMRS. It is both contrary to the goals of the Communications Act, and the Commission’s policies to ensure a consistent, uniform regulatory framework for CMRS, for the Commission to delegate to the states such broad rulemaking and enforcement powers, particularly over radio equipment such as digital wireless handsets.

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<sup>11</sup> *Id.*, at 7994, 8024.

First, neither the Commission’s proposals in this docket nor, to Verizon Wireless’s knowledge, commenting parties advocated a rulemaking and enforcement role for individual states over wireless services. The Commission sought comment “on whether [it] should modify these complaint procedures as they apply to wireless phones.”<sup>12</sup> By their terms, however, these rules apply to equipment *manufacturers*, not service providers, and the Commission provided interested parties no notice of its intent to so dramatically expand the scope of these rules. For the same reasons that the creation of a tiered regulatory structure in Section 20.19(c) raises Administrative Procedure Act concerns, so too does Section 20.19(g)’s authorization to state commissions to adopt rules to implement and enforce this section. The lack of notice here is particularly serious given that, in numerous other contexts, the Commission has emphasized the importance of uniform, exclusive federal oversight of wireless technical rules.<sup>13</sup>

Second, paragraph 95 contains no stated rationale for why the Commission has determined that a state rulemaking and enforcement role is lawful or necessary. There is no explanation as to why the Commission is not able to enforce the HAC rules itself, or why a separate state role is necessary. Paragraph 95 refers to the rules that were previously adopted to promote compatibility between landline telephones and hearing aids, but this passing reference is clearly insufficient. It is also inappropriate. Those rules are contained in Part 68, which deals with connection of terminal devices to the *landline* network, and has nothing to do with the provision of wireless networks or wireless equipment – much less wireless *services*. Moreover, these long-standing Part 68 enforcement rules understandably contemplate a role for state

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<sup>12</sup> Section 63.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, Notice of Proposed Rulemaking, 16 FCC Rcd. 20558, ¶ 35 (2001).

<sup>13</sup> See, e.g., Verizon Wireless’s Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligations, FCC 02-215, Memorandum Opinion and Order, rel. July 26, 2002, at para. 33, rejecting requests of Vermont and California for authority to adopt LNP requirements: “Uniform, national rules for  
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commissions because of their traditional regulatory authority over intrastate landline services. These considerations are irrelevant to the regulation of CMRS.

Third, this sudden and unexplained authorization to the states to enforce wireless rules does not even acknowledge (let alone justify) such a clear departure from applicable law and policy governing the regulation of CMRS. The other cardinal objective of the 1993 amendments to Section 332 was to place this evolving industry squarely under federal oversight, in part because of the fact that CMRS is a radio service that operates without regard to state borders. The Commission has itself repeatedly noted the public interest benefits that result from consistent federal regulation.<sup>14</sup> Pronouncements as to the wisdom of uniform Commission (as opposed to state) regulation and enforcement are particularly true in the area of technical standards, precisely the area that is addressed by the HAC rules, which impose technical performance standards on wireless handsets. As far back as 1983, when first adopting rules for the new cellular service, the Commission expressly preempted states from adopting technical regulations.<sup>15</sup> On reconsideration of that action, the Commission again affirmed that it was asserting exclusive authority over technical operations, and again relied on its findings that a state role “could frustrate the federal scheme for the provision of nationwide cellular service.”<sup>16</sup>

The reasons for a plenary federal role are particularly compelling where, as here, the Commission has adopted rules setting radiofrequency emissions standards for wireless products.

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(footnote continued)

number portability are necessary to minimize confusion and additional expense related to compliance with independent regulatory requirements.”

<sup>14</sup> See discussion *infra* at 4.

<sup>15</sup> *Domestic Public Cellular Radio Communications Services, Report and Order*, 86 FCC 2d 469 (1981) at para. 84.

<sup>16</sup> *Domestic Public Cellular Radio Communications Services, Memorandum Opinion and Order on Reconsideration*, 89 FCC 2d 58 (1982) at para. 82.

In the past, the Commission has correctly preserved its exclusive role over RF issues.<sup>17</sup> Just three months ago, in preempting a local ordinance because it effectively attempted to enforce standards for RF emissions, the Commission declared: “The Commission and the federal courts have consistently found that the Commission’s authority in the area of RFI [radiofrequency interference] is exclusive and any attempt by State or local governments to regulate in the area of RF is preempted.”<sup>18</sup>

Finally, Section 255(f) of the Act gives the Commission exclusive jurisdiction over Section 255 complaints.<sup>19</sup> While the HAC Act and Section 255 impose distinct obligations, the Commission’s rules implementing Section 255 include hearing aid-related provisions.<sup>20</sup> Delegating authority over wireless HAC complaints to state commissions thus poses a risk of incompatible state and federal rulings, not to mention jurisdictional disputes.

The delegation to states of enforcement authority over the performance of digital wireless handsets is thus not only unprecedented but inconsistent with precedent. The existing informal complaint process enforced by the Commission is far simpler and provides an adequate forum for considering consumers’ HAC-related complaints. The Commission should reconsider its

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<sup>17</sup> Cf. *Interference Immunity Performance Specifications for Radio Receivers*, ET Docket No. 03-65, *Notice of Inquiry*, rel. March 24, 2003. In this proceeding as with other actions that involve radio equipment and RF emissions matters, the Commission has not suggested a state regulatory role, making the delegation of enforcement authority to the states over HAC performance standards even more questionable. See also *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 430 n.6 (1963) (Congress intended the FCC to possess exclusive authority over technical matters related to radio broadcasting); *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994, 997 (6th Cir. 1994) (same).

<sup>18</sup> *Petition of Cingular Wireless L.L.C for a Declaratory Ruling that Provisions of the Anne Arundel County Zoning Ordinance are Preempted*, WT Docket No. 02-100, *Memorandum Opinion and Order* (rel. July 7, 2003).

<sup>19</sup> *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417.

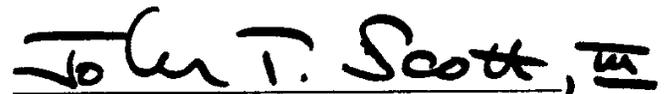
<sup>20</sup> See 47 C.F.R. § 6.3(a)(2)(viii)-(ix).

creation of a separate regulatory and enforcement role for the states, and remove Section 20.19(g).

Respectfully submitted,

**VERIZON WIRELESS**

By:

A handwritten signature in black ink that reads "John T. Scott, III". The signature is written in a cursive style with a horizontal line underneath the name.

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